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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Office of Proceedings

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STB DOCKET NO. AB-6 (Sub-No. 477X)

Part of  
Public Record

BNSF RAILWAY COMPANY  
ABANDONMENT OF RAIL FREIGHT SERVICE EASEMENT EXEMPTION  
IN LOS ANGELES COUNTY, CALIFORNIA

REPLY TO PETITION FOR EXEMPTION

THE SILVERSTEIN LAW FIRM, APC  
ROBERT P. SILVERSTEIN  
BRADLY S. TORGAN  
215 North Marengo Avenue, 3rd Floor  
Pasadena, CA 91101-1504  
Telephone: (626) 449-4200

Attorneys for Excalibur Property Holdings,  
LLC and George Brokate

Dated: July 8, 2011

**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

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**REPLY TO PETITION FOR EXEMPTION**

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Excalibur Property Holdings, LLC and George Brokate ("Excalibur") hereby reply to the petition of BNSF Railway Company ("BNSF") to the Surface Transportation Board ("Board") to exempt, under 49 U.S.C. § 10502, BNSF's proposed abandonment of a rail freight service easement located in Los Angeles County, California, from the prior approval requirements of 49 U.S.C. §§ 10903-05.

These comments are submitted in response to the Petition for Exemption filed by BNSF on May 31, 2011 and the Environmental Report filed by BNSF on May 12, 2011. Excalibur has previously submitted preliminary environmental comments in a letter dated May 25, 2011, and submits further environmental comments herein.

The BNSF Petition for Exemption is part of a project known as the Gold Line Phase 2A light rail extension project. That project will have a significant and adverse effect on property owners, local rail transportation and the environment. These

environmental concerns have not been adequately addressed either in state court proceedings or in federal proceedings. Indeed, as discussed further below, litigation is currently pending in California state court challenging the adequacy of the project's environmental impact report under the California Environmental Quality Act ("CEQA").

BNSF has failed to promptly make available information regarding federal rights-of-way affected by the proposed abandonment. It has also failed to notify a number of parties having an interest in the proposal. Nor has BNSF adequately justified its request for exemption from provisions for offers of financial assistance.

### **PROPOSED TRANSACTION**

In its Petition for Exemption, BNSF states that it is seeking abandonment of BNSF's "Rail Freight Service Easement" over an approximately 4.85-mile rail line owned by the Los Angeles County Metropolitan Transportation Authority ("LACMTA"), located between milepost 119.35, just east of the San Gabriel River in Irwindale, California, and milepost 124.20, just east of the Santa Anita Blvd. rail grade crossing in Arcadia, California.

The petition states at page 4 that the line is part of a group of rail lines acquired by LACMTA in or about 1992. In that transaction, the Atchison, Topeka and Santa Fe Railway retained the exclusive, permanent easement to continue providing freight common carrier service over the line. According to the petition, the Interstate Commerce Commission found that restrictions on ATSF's freight service were so extensive that LACMTA was deemed to be a railroad subject to the jurisdiction of the ICC.

According to the petition, LACMTA and a number of other county transportation agencies then obtained a blanket exemption from 49 U.S.C. subtitle IV for their ownership and operation over rail lines they had acquired from ATSF. Thus, the petition argues, LACMTA's abandonment of its operations over the line has already been exempted by the Board. Assuming this is true, the current Petition for Exemption by BNSF may represent the best, if not the only, opportunity for this Board to analyze and mitigate the environmental and other effects of the proposed abandonment and the project to which it relates.

**THE PROPOSED ABANDONMENT RAISES SIGNIFICANT  
ENVIRONMENTAL CONCERNS THAT HAVE NOT BEEN  
ADEQUATELY ADDRESSED UNDER STATE LAW OR NEPA**

**A. The State Court CEQA Litigation.**

In the Environmental and Historic Reports filed by BNSF on or about May 12, 2011, BNSF states in Section 1 that "[t]he removal of the track and track materials associated with the abandonment of BNSF's Rail Freight Service Easement and the extension of light rail service have already been addressed by the Metro Gold Line Foothill Extension Construction Authority in an Environmental Impact Report and Supplemental Environmental Impact Report ("SEIR")."

However, BNSF's claim that the environmental concerns "have already been addressed" is misleading. As BNSF knows or should know, the Supplemental Environmental Impact Report to which BNSF refers, and on which it directly asks the Board to rely, is currently being challenged in California state court in *Excalibur Property Holdings LLC v. Pasadena Metro Blue Line Construction Authority*, Los

Angeles County Superior Court Case No. BS130732, filed February 17, 2011. A copy of the conformed First Amended Petition for Writ of Mandate in that matter is attached hereto as Exhibit 1. An October 26, 2011 trial date has been set in that matter.

Invalidation of the SEIR in the state court litigation would invalidate the environmental review on which the BNSF Petition for Abandonment is based, thereby also rendering any decision by the STB invalid. Accordingly, no action should be taken on any BNSF or other request for abandonment until complete resolution of the litigation.

The state court environmental action challenges the adequacy of required CEQA approvals in connection with the Gold Line Phase II, Pasadena to Montclair – Foothill Extension 2A project (“Phase 2A Project”). The Phase 2A Project includes approximately 11.5 miles of light rail track and associated infrastructure through six cities in the San Gabriel Valley portion of Los Angeles County.

Specifically, the proceeding challenges the actions of the Metro Gold Line Foothill Extension Construction Authority<sup>1</sup> in certifying an SEIR and related approvals for the Phase 2A Project, and seeks a writ of mandate invalidating and setting aside certification of the Phase 2A project and an order compelling preparation of a legally adequate SEIR.

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<sup>1</sup> The relevant agency in this case is the Pasadena Metro Blue Line Construction Authority, also doing business as the Metro Gold Line Foothill Extension Construction Authority (hereinafter the “Gold Line”). Under the Gold Line’s enabling legislation, California Public Utilities Code Section 132400, *et seq.*, LACMTA is the successor-in-interest to the Gold Line. The Gold Line ceases existence upon completion of the project, with LACMTA assuming operation control. Pub. Util. Code § 132450. The project is also funded through a Master Cooperative and Funding Agreement between the two agencies.

prior to consideration of any further resolutions, legislative actions or approvals concerning the Phase 2A Project.

A Draft EIR and Draft Environmental Impact Statement (“EIS”) were issued for the Gold Line Phase II, Pasadena to Montclair – Foothill Extension in April 2004 (“2004 DEIR/DEIS”). The Gold Line was the lead agency for purposes of CEQA, and the Federal Transit Administration (“FTA”) was the lead agency for purposes of the National Environmental Policy Act (“NEPA”).

Subsequent to circulation of the 2004 DEIR/DEIS, the Gold Line decided to fund Phase 2A of the Gold Line Phase II, Pasadena to Montclair – Foothill Extension without federal funds, with the intention of having environmental impact documentation for the Gold Line Phase II, Pasadena to Montclair – Foothill Extension to proceed solely as an EIR pursuant to CEQA.

The Gold Line Phase II, Pasadena to Montclair – Foothill Extension Final EIR was certified by the Gold Line’s governing board in 2007 (“2007 FEIR”).

The FTA subsequently withdrew the Draft EIS for the Gold Line Phase II, Pasadena to Montclair – Foothill Extension on or about June 25, 2010.

On or about May 17, 2010, the Gold Line issued a Notice of Preparation of an SEIR for the Phase 2A Project, the Pasadena to Azusa portion of the Gold Line Phase II, Pasadena to Montclair – Foothill Extension.

Subsequently, in approximately November 2010, the Gold Line caused a Draft SEIR for the Phase 2A Project to be prepared and circulated.

On or about January 18, 2011, the Gold Line's governing board certified the Final SEIR for the Phase 2A Project.

The Phase 2A Project as described in the SEIR contained several changes from that which was approved and/or certified in the 2007 FEIR, including relocation of a proposed maintenance and operations facility ("M&O Facility") from Irwindale to Monrovia, relocation of parking structures at the Monrovia and Irwindale light rail stations, and replacement of two bridges.

Prior to the Gold Line's certification of the SEIR for the Phase 2A Project, on or about December 27, 2010, the FTA issued a Notice of Intent to prepare an EIS for the Phase 2B Project, the Azusa to Montclair portion of the Gold Line Phase II, Pasadena to Montclair – Foothill Extension. The Notice of Intent indicates that the Gold Line will be preparing a joint EIR/EIS with FTA in order to comply with both CEQA and NEPA.

Prior to Excalibur's commencing the state court CEQA litigation (**Exhibit 1** hereto), the Gold Line had issued a Notice of Preparation for either an EIR or a Supplemental EIR and began scoping meetings in anticipation of preparation of the environmental documentation for the Phase 2B Project.

In the state court CEQA litigation, Excalibur contends that the Gold Line's action in certifying the SEIR for the Phase 2A Project constitutes a prejudicial abuse of discretion in that the Gold Line failed to proceed in the manner required by law and failed to support its decision by substantial evidence, including but not limited to as follows:

The Gold Line improperly segmented or "piecemealed" the Phase 2A Project from the Phase 2B Project and the overall Gold Line Phase II, Pasadena to Montclair – Foothill

Extension. The Phase 2A Project and Phase 2B project, both segments of the Gold Line Phase II, Pasadena to Montclair – Foothill Extension, are interrelated actions because they are related as to time, infrastructure and the entity undertaking the action. The Phase 2A Project benefits from and is directly tied to and interrelated with the Phase 2B Project, and vice versa. The Phase 2A Project and the Phase 2B Project are part of a single coordinated endeavor, the Gold Line Phase II, Pasadena to Montclair – Foothill Extension.

The Gold Line relied on an improper project description because the Phase 2A Project is piecemealed from the Phase 2B Project and the overall Gold Line Phase II, Pasadena to Montclair – Foothill Extension. The project description in the Phase 2A Project SEIR is erroneous and misleading, and the Gold Line's approval of the Phase 2A Project SEIR with this defect was a further abuse of discretion. The separate evaluation of these impacts frustrates the purpose of CEQA, i.e., informed public participation and informed decision making.

Because the Gold Line piecemealed the Phase 2A Project from the Phase 2B Project and the overall Gold Line Phase II, Pasadena to Montclair – Foothill Extension, the Gold Line has avoided, *inter alia*, complete study of environmental impacts, analysis of the required reasonable range of alternatives, and proper consideration of mitigation measures.

As set forth in Excalibur's First Amended Petition (**Exhibit 1** hereto), the Gold Line failed to proceed in the manner required by law and failed to support its decision by substantial evidence.



First, the Phase 2A Project SEIR fails to evaluate properly, and with a good faith effort at full disclosure, the Project's significant impacts on, *inter alia*, air quality, traffic, noise, hazardous materials, land use/planning, recreation and hydrology.

Second, the Phase 2A Project SEIR fails to consider a reasonable range of off-site alternatives, including alternatives identified as feasible in other public records in possession of the Gold Line, and fails to adopt an alternative that could have avoided or substantially lessened the Phase 2A Project's significant environmental impacts, including those related to the proposed taking and destruction of numerous private properties and businesses.

Third, the Phase 2A Project SEIR fails properly to analyze impacts of the one off-site alternative it does ostensibly consider, including but not limited to impacts to land use/planning, traffic, noise, hazardous materials, and hydrology.

Additionally, the Phase 2A Project SEIR fails to consider a reasonable range of on-site alternative configurations, and fails to adopt an alternative that could have avoided or substantially lessened the Phase 2A Project's significant environmental impacts, including those related to the proposed taking and destruction of numerous private properties and businesses.

The Phase 2A Project SEIR is also inconsistent with the 2007 FEIR it purports to supplement.

CEQA requires every lead agency to provide a good faith, reasoned analysis in response to comments received on an EIR, to address recommendations and objections in detail, and to explain why specific comments and suggestions, especially those of

experts, were not accepted. The Phase 2A Project SEIR fails to respond adequately, or in many cases at all, to comments on the SEIR, including comments from Excalibur's experts, and including but not limited to comments regarding air quality, traffic, noise, hazardous materials, land use/planning, recreation, hydrology, feasibility, and reduced environmental impacts of alternatives.

The Gold Line's action in certifying the SEIR for the Phase 2A Project also constituted an improper, *post hoc* rationalization for a decision to locate the M&O Facility in Monrovia, which decision was effectively made prior to approval and/or certification of the Phase 2A Project SEIR.

The action seeks a writ of mandate directing the Gold Line to vacate and set aside its Phase 2A Project approvals, and to vacate and set aside its approval and/or certification of the SEIR for the Phase 2A Project. It also seeks a writ of mandate enjoining the authority to grant any contracts, authority, permits or entitlements as part of the Phase 2A Project until a valid and adequate Phase 2A Project SEIR is prepared, circulated, and certified as complete, consistent with CEQA, the CEQA Guidelines, and all other applicable laws.

Section 3 of the Environmental Report filed by BNSF with the Board in this proceeding also claims that "the proposed action is consistent with existing land use plans. See SEIR." However, in related administrative proceedings, Excalibur has objected to the legality of the project – of which the proposed abandonment is a part – based on inconsistency with the City of Monrovia General Plan.

The project of which the proposed abandonment is a part includes a heavy industrial maintenance and operations facility in an area of Monrovia classified in the Monrovia General Plan as PD-12: Station Square Transit Village. (See Exhibit 2 to Excalibur's May 25, 2011 letter already on file with the Board [excerpts from City of Monrovia General Plan Land Use Element].) Under the Monrovia Municipal Code, properties in PD zones are subject to the provisions of the Land Use Element of the City's General Plan. Monrovia Municipal Code § 17.08.010. The Land Use Element, however, does not permit new heavy industrial uses in the PD-12 zone.

The project also requires a specific plan for that portion in PD-12, an additional legislative action on the part of the City of Monrovia that has not yet occurred.

The City of Monrovia does not even appear to have been noticed with respect to this filing, even though the track in question passes through Monrovia. Other jurisdictions were noticed. (See Section 3, p. 3, of the BNSF Petition.) No action should be taken on any request for abandonment until the issue of land use plan consistency is resolved.

Since there is currently nothing more than a deficient CEQA review on which BNSF relies for environmental clearance before this Board, the Board should not, and legally cannot, approve the BNSF Petition or the proposed BNSF/LACMTA agreement related thereto.

**B. NEPA Environmental Concerns and Objections.**

A major federal action is sought here, i.e., STB approval of the abandonment of the line and introduction of a much more intense and environmentally disruptive use, i.e.,

the Gold Line light rail system. The Phase 2A Project involves federal rights-of-way and requires approval by multiple state and federal agencies. The project would significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(c). Therefore, NEPA review must also be performed.

However, to Excalibur's knowledge, no such NEPA review has been performed. Instead, BNSF's petition relies on the state CEQA review. That is problematic for two reasons: 1) NEPA and CEQA standards are not identical, including but not limited to the area of environmental justice; and 2) as noted above, the CEQA review is being litigated in state court, and the SEIR most likely will be invalidated.

Demonstrating that these concerns are real, the City of Monrovia, which initially cooperated with the Gold Line in exploring the feasibility of the proposal to locate an M&O Facility for the proposed project in Monrovia, has recently identified NEPA concerns and issues related the proposed project.

As set forth in an email from Alisa Do, aide to Congressman David Dreier, to Scott Ochoa, City Manager of the City of Monrovia, a copy of which is attached hereto as **Exhibit 2**, the Army Corps of Engineers is performing an environmental assessment for the bridges under its jurisdiction along the alignment (i.e., San Gabriel River Bridge, LA County Flood Control District bridges). Mr. Ochoa writes: "Such an assessment was not covered as part of the January SEIR and needs a NEPA review. In reviewing the document, our staff identified a few omissions and shortcomings." Monrovia has thus "submitted concerns and objections regarding the NEPA" review.

Excalibur just learned of this development through a response to a California Public Records Act request, and is now seeking to obtain a copy of the City of Monrovia's NEPA objections for the Board's consideration. Excalibur will supplement with those objections in further support of this reply.

**THE APPLICATION OF 49 U.S.C. § 10903 IS NECESSARY  
TO CARRY OUT THE RAIL TRANSPORTATION POLICY**

Among the rail transportation policies expressly set forth in 49 U.S.C. § 10101 are, as stated in subsection (2), "to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required." The fact that there has been no federal environmental review of the project under NEPA, and that California state court litigation under CEQA is pending, raises significant and serious environmental concerns. That means that both the need for federal regulatory control over rail transportation would not be minimized by granting the requested exemption prior to completion of such environmental reviews, nor would any resulting decision be "fair" to the public or to the objecting party, Excalibur. See also the rail transportation policy set forth in subsection (8), "to operate transportation facilities and equipment without detriment to the public health and safety." Again, the unresolved environmental concerns here raise a red flag in this regard.

## **THE PROPOSED TRANSACTION IS NOT OF LIMITED SCOPE**

BNSF argues that the proposed transaction is of “limited scope” because of the absence of shippers in recent years and the fact that the line has been used for rail storage. However, the fact that the entire purpose of BNSF’s proposed abandonment is to turn the line into a heavily-trafficked light rail line shows that the transaction is large in scope, not limited in scope. BNSF admits that it will take a line it characterizes as dormant and turn it into an active Gold Line line, thereby facilitating a larger project that will result in substantial passenger rail traffic. Unlike many proposed abandonments reviewed by the Board, this is not a “limited scope” transaction.

## **EXEMPTION FROM 49 U.S.C. SECTIONS 10904 AND 10905 IS NOT WARRANTED AND SHOULD BE DENIED**

BNSF makes improper proposals on LACMTA’s behalf, including that the Board dispense with the ordinary provisions allowing for Offers of Financial Assistance on the grounds that “LACMTA is concerned that any individual filing an OFA in this proceeding would have” “ulterior motives.” (Petition, p. 5.) The fact that LACMTA, not a petitioning party, would prefer to dispense with these important procedural protections is of no relevance.

First, BNSF’s petition does not attempt to properly document that the portion of line at issue has been out of service for the past two years. BNSF has not attempted to proceed on a notice of exemption basis. 49 C.F.R. § 1152.50 provides (emphasis added) that, “An abandonment or discontinuance of service or trackage rights is exempt if the

carrier **certifies** that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines **and that no formal complaint filed by a user of rail service on the line (or a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or any U.S. District Court or has been decided in favor of the complainant within the 2-year period.**" BNSF has not met this standard, confining itself to alleging vaguely that there has been "no local traffic" for two years and with no specific evidentiary support whatsoever, that the line "qualifies for" the two-year out of service exemption. This remains an empty legal conclusion that BNSF has failed to support in its petition. At page 3 of its Environmental Report, BNSF admits that the line has been "used for storing empty freight cars." At a minimum, then, the line has supported rail freight service on adjacent lines and has some usage over the past two years.

Further, because the line has recently been used for freight storage, and now will be converted to passenger rail service if the project passes environmental muster, the proposed abandonment is more environmentally significant than a typical proposed abandonment of a rail line. The result of the project would be to massively increase traffic on the line, resulting in numerous, significant environmental impacts. That is why the lack of proper analysis under NEPA and the existence of concerns under that Act cannot be taken lightly.

BNSF offers examples of cases in which the Board or the ICC have allowed exemptions from Sections 10904 and 10905 where a line is proposed to be used for a

“valid public purpose.” However, nothing in those statutes mandates that such exemption be granted, and given that significant environmental issues have yet to be resolved at either the state or federal level, an order precluding all offers of financial assistance on the assumption that a “valid public purpose” would be served by the Gold Line’s proposed use is premature, and has not been adequately supported by BNSF’s petition.

**BNSF DOES NOT APPEAR TO HAVE GIVEN NOTICE OF ITS PETITION  
FOR EXEMPTION TO ALL INTERESTED AND AFFECTED PARTIES**

The petition should also be denied or stayed because BNSF does not appear to have given notice to all interested parties. Directly affected parties omitted from BNSF’s proof of service are the City of Monrovia, the City of Duarte, the City of Bradbury, the Metropolitan Transit Authority, the Metro Blue Line, the Metro Gold Line, and potential shippers such as Miller/Coors in Irwindale, California, and others.

BNSF’s failure to give notice to the City of Monrovia is particularly difficult to comprehend, since the City of Monrovia and the Monrovia Redevelopment Agency are directly involved in proposals to site the Gold Line M&O Facility in Monrovia. Further, as noted in the discussion of environmental issues, supra, the City of Monrovia has recently raised NEPA objections against the project which would result from the proposed abandonment.

Finally, despite significant water quality issues in this area and ongoing suits and proceedings by the San Gabriel Valley Water Quality Authority, BNSF appears not to



have notified any water agency or the Los Angeles County Flood Control District of its petition.

**THE BOARD SHOULD ALSO STAY OR DENY THE PETITION  
BECAUSE BNSF HAS FAILED TO COMPLY WITH THE BOARD'S  
FEDERAL REGISTER NOTICE THAT BNSF WOULD "PROMPTLY" MAKE  
AVAILABLE INFORMATION ON FEDERAL RIGHTS-OF-WAY**

According to BNSF's Petition for Exemption filed with the Board on or about May 31, 2011, as well as the Federal Register notice published on or about June 20, 2011 in response thereto, based on information in BNSF's possession, the subject line contains federally granted rights-of-way, and any documentation in BNSF's possession regarding federally granted rights-of-way would be made available promptly to those requesting it.

The San Gabriel River is a federal property. For this reason alone, the line contains federal rights-of-way that must be considered.

On June 30, 2011, Excalibur requested that BNSF promptly forward to counsel for Excalibur all documentation in BNSF's possession pertaining to federally granted rights-of-way. However, as of the date of filing of this reply, no such information has been provided by BNSF. As a procedural matter, Excalibur has been denied this information that the Board's Federal Register Notice promised would be promptly provided by BNSF to those requesting it. Excalibur has thus been prejudiced, procedurally and substantively, in its ability to reply to BNSF's petition.

Excalibur respectfully requests that consideration of the Petition for Exemption be stayed or denied for this additional independent reason, unless and until Excalibur:

(1) has been provided the materials on federal rights-of-way that the STB's Federal

Register notice stated BNSF would “promptly” provide; and (2) has had a full and fair opportunity to review and comment on such materials, and to amend or supplement this reply to BNSF’s Petition for Exemption accordingly.

## **CONCLUSION**

The project which the Petition for Exemption and proposed abandonment would enable involve significant state and federal environmental issues. The proposed abandonment would not merely shift rail freight traffic to trucks, but would create a new set of major impacts, with significant consequences for the environment which exceed those normally presented by an abandonment application or a Petition for Exemption. A stay of this proceeding until the state court CEQA matter is resolved, at a minimum, is necessary and appropriate.

This is also a case in which application of the regulatory requirements and procedures of 49 U.S.C. §§ 10903-05 is necessary and appropriate to carry out the rail transportation policies set forth in 49 U.S.C. § 10101, for the reasons described in this reply. The proposed abandonment is not of a limited scope, but rather would have significant environmental impacts that have yet to be analyzed under federal law, and which have not been properly evaluated under applicable state laws.

Excalibur respectfully urges the Board to deny BNSF’s Petition for Exemption or, in the alternative, to stay this proceeding until: (1) Excalibur has been provided, and has had an opportunity to comment on, information pertaining to the federal rights-of-way

affected by the project that the Federal Register notice stated would be promptly provided to interested parties upon request; and (2) the pending CEQA litigation has been resolved.

Respectfully submitted,

**THE SILVERSTEIN LAW FIRM, APC**

By:   
ROBERT P. SILVERSTEIN  
BRADLY S. TORGAN

THE SILVERSTEIN LAW FIRM, APC  
215 North Marengo Avenue, 3rd Floor  
Pasadena, CA 91101-1504  
Telephone: (626) 449-4200

Attorneys for EXCALIBUR PROPERTY  
HOLDINGS, LLC and GEORGE  
BROKATE

**CERTIFICATE OF SERVICE**

**STB DOCKET NO. AB-6 (Sub-No. 477X)**

I, Esther Kornfeld, declare:

I certify that I served the foregoing **REPLY TO PETITION FOR EXEMPTION** this 8th of July 2011, by first class, postage prepaid, on the parties listed below:

Karl Morell  
Of Counsel  
Ball Janik LLP  
655 Fifteenth Street, N.W.  
Suite 225  
Washington, DC 20005  
*Attorneys for BNSF Railway Company*

David T. Rankin, Esq.  
Senior General Attorney  
2500 Lou Menk Drive, AOB-3  
Fort Worth, TX 76131  
*Attorney for BNSF Railway Company*

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 8, 2011 at Pasadena, California.

  
\_\_\_\_\_  
ESTHER KORNFELD

**EXHIBIT 1**

THE SILVERSTEIN LAW FIRM, APC  
215 North Marengo Avenue, 3<sup>rd</sup> Floor  
Pasadena, CA 91101-1504

THE SILVERSTEIN LAW FIRM, APC  
ROBERT P. SILVERSTEIN (Bar No. 185105)  
BRADLY S. TORGAN (Bar No. 183146)  
215 North Marengo Avenue, 3rd Floor  
Pasadena, CA 91101-1504  
Telephone: (626) 449-4200  
Facsimile: (626) 449-4205  
Robert@RobertSilversteinLaw.com

Attorneys for Petitioners  
EXCALIBUR PROPERTY HOLDINGS, LLC  
and GEORGE BROKATE

**CONFORMED COPY  
OF ORIGINAL FILED**  
Los Angeles Superior Court

FEB 18 2011

John A. Clarke, Executive Officer/Clerk

By [Signature] Bsp  
B.M. SWAIN

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES**

EXCALIBUR PROPERTY HOLDINGS,  
LLC, a California Limited Liability  
Company, and GEORGE BROKATE, an  
individual,

Petitioners,

vs.

PASADENA METRO BLUE LINE  
CONSTRUCTION AUTHORITY, also  
doing business as METRO GOLD LINE  
FOOTHILL EXTENSION  
CONSTRUCTION AUTHORITY, a public  
entity, and DOES 1 through 20, inclusive,

Respondents.

LOS ANGELES COUNTY  
METROPOLITAN TRANSPORTATION  
AUTHORITY, a public entity, and DOES 1-  
20, inclusive,

Real Parties in Interest.

Case No. BS 130732

**FIRST AMENDED PETITION FOR  
WRIT OF MANDATE**

[California Environmental Quality Act,  
("CEQA"), Public Resources Code  
Section 21000, et seq.]

Petitioners Excalibur Property Holdings, LLC, and George Brokate (hereinafter "Petitioners"), allege as follows:

### INTRODUCTION

1. This action challenges decisions by respondent Pasadena Metro Blue Line Construction Authority, sometimes known as the Metro Gold Line Foothill Extension Construction Authority (hereinafter "Respondent"), in connection with the Gold Line Phase II, Pasadena to Montclair – Foothill Extension 2A project ("Phase 2A Project").

2. The Phase 2A Project includes approximately 11.5 miles of light rail track and associated infrastructure through six cities in the San Gabriel Valley portion of Los Angeles County, and includes the proposed construction of a maintenance and operations facility ("M&O Facility") in the City of Monrovia.

3. The Phase 2A Project is sometimes referred to as the Gold Line Phase II, Pasadena to Azusa – Foothill Extension project in order to distinguish it from the Gold Line Phase II, Azusa to Montclair – Foothill Extension project, which itself is sometimes referred to as the Gold Line Phase II, Pasadena to Montclair – Foothill Extension Phase 2B project. ("Phase 2B Project").

4. Petitioners are informed and believe, and based thereon allege, that Respondent intends to improperly and without sufficient legal basis use the power of eminent domain to attempt to take Petitioners' property for construction of the M&O Facility. This petition is filed as both a direct challenge to the adequacy of Respondent's required pre-condemnation California Environmental Quality Act ("CEQA") approvals, and also as an affirmative defense to any eminent domain action that may be filed.

5. Petitioners challenge Respondent's actions in certifying a Supplemental Environmental Impact Report ("SEIR") and related approvals for the Phase 2A Project, including but not limited to the adoption of findings of fact and a Statement of Overriding Considerations.

6. Petitioners allege that Respondent's actions violate provisions of CEQA. Petitioners seek a writ of mandate, *inter alia*, invalidating and setting aside Respondent's

1 certification of the Phase 2A Project SEIR and related approvals and compelling  
2 Respondent to comply with CEQA and to prepare, certify and approve a legally adequate  
3 SEIR prior to consideration of any further resolutions, legislative actions or approvals  
4 concerning the Phase 2A Project.

5 **PARTIES**

6 7. Petitioner Excalibur Property Holdings, LLC, is a California limited liability  
7 company that has ownership interests in real property in the City of Monrovia that will be  
8 adversely affected by the Phase 2A Project.

9 8. Petitioner George Brokate is an individual who has ownership interests in  
10 real property in the City of Monrovia that will be adversely affected by the Phase 2A  
11 Project.

12 9. Petitioners are suing on their behalf, and on behalf of all others who will be  
13 affected by the Phase 2A Project, as well as all citizens of Los Angeles County.

14 10. Petitioners are informed and believe, and based thereon allege, that  
15 Respondent Pasadena Metro Blue Line Construction Authority is a public entity created  
16 by statute for the purpose of, *inter alia*, awarding and overseeing design and construction  
17 contracts for completion of the Gold Line Phase II, Pasadena to Montclair – Foothill  
18 Extension, Phase 2A and Phase 2B.

19 11. Petitioners are informed and believe, and based thereon allege, that  
20 Respondent is also known as the Metro Gold Line Foothill Extension Construction  
21 Authority and is governed by a board consisting of five voting members and one  
22 nonvoting member, as follows: three members appointed by the city councils of the Cities  
23 of Los Angeles, Pasadena, and South Pasadena, with each city council appointing one  
24 member by a majority vote of the membership of that city council; one member appointed  
25 by the President of the governing board of the San Gabriel Valley Council of  
26 Governments, subject to confirmation by that board; one member appointed by the Los  
27 Angeles County Metropolitan Transportation Authority; and one nonvoting member  
28 appointed by the Governor of the State of California.



1           12.     Petitioners are informed and believe, and based thereon allege, that the Los  
2 Angeles County Metropolitan Transportation Authority ("Metro"), named as a real party  
3 in interest, is and at all times herein mentioned was, a public entity duly organized and  
4 existing under the laws of the State of California.

5           13.     Petitioners are ignorant of the true names of respondents sued herein as  
6 DOES 1 through 20, inclusive, and therefore sue said respondents by those fictitious  
7 names. Petitioners will amend this petition to allege their true names and capacities when  
8 the same have been ascertained. Petitioners are informed and believe, and based thereon  
9 allege, that each of these fictitiously named respondents is in some manner responsible for  
10 the wrongful conduct alleged in this petition. Petitioners are informed and believe, and  
11 based thereon allege, that these fictitiously named respondents were, at all times  
12 mentioned in this petition, the agents, servants, and employees of their co-respondents and  
13 were acting within their authority as such with the consent and permission of their co-  
14 respondents.

15           14.     Petitioners are ignorant of the true names of real parties sued herein as  
16 ROES 1 through 20, inclusive, and therefore sue said real parties by those fictitious  
17 names. Petitioners will amend their petition to allege their true names and capacities  
18 when the same have been ascertained. Petitioners are informed and believe, and based  
19 thereon allege, that each of these fictitiously named real parties is in some manner  
20 responsible for the wrongful conduct alleged in this petition. Petitioners are informed and  
21 believe, and based thereon allege, that these fictitiously named real parties were, at all  
22 times mentioned in this petition, the agents, servants, and employees of their co-real  
23 parties and were acting within their authority as such with the consent and permission of  
24 their co-real parties.

### 25                                   GENERAL ALLEGATIONS

26           15.     A Draft EIR and Draft Environmental Impact Statement ("EIS") were issued  
27 for the Gold Line Phase II, Pasadena to Montclair – Foothill Extension in April 2004  
28 ("2004 DEIR/DEIS"). Respondent was the lead agency for purposes of CEQA, and the

1 Federal Transit Administration ("FTA") was the lead agency for purposes of the National  
2 Environmental Policy Act ("NEPA").

3 16. Petitioners are informed and believe, and based thereon allege, that  
4 subsequent to circulation of the 2004 DEIR/DEIS, Respondent decided to fund Phase 2A  
5 of the Gold Line Phase II, Pasadena to Montclair – Foothill Extension without federal  
6 funds, with the intention of allowing environmental impact documentation for the Gold  
7 Line Phase II, Pasadena to Montclair – Foothill Extension to proceed solely as an EIR  
8 pursuant to CEQA.

9 17. The Gold Line Phase II, Pasadena to Montclair – Foothill Extension Final  
10 EIR was certified by Respondent's governing board in 2007 ("2007 FEIR").

11 18. Petitioners are informed and believe, and based thereon allege, that the FTA  
12 subsequently withdrew the Draft EIS for the Gold Line Phase II, Pasadena to Montclair –  
13 Foothill Extension on or about June 25, 2010.

14 19. On or about May 17, 2010, Respondent issued a Notice of Preparation of a  
15 SEIR for the Phase 2A Project, the Pasadena to Azusa portion of the Gold Line Phase II,  
16 Pasadena to Montclair – Foothill Extension.

17 20. Subsequently, in approximately November 2010, Respondent caused a Draft  
18 SEIR for the Phase 2A Project to be prepared and circulated.

19 21. On or about January 18, 2011, Respondent's governing board approved  
20 and/or certified the Final SEIR for the Phase 2A Project.

21 22. A Notice of Determination to carry out the Phase 2A Project was recorded  
22 with the office of the Los Angeles County Clerk by Respondent on or about January 19,  
23 2011.

24 23. The Phase 2A Project as described in the SEIR contains several changes  
25 from that which was approved and/or certified in the 2007 FEIR, including relocation of  
26 the M&O Facility from Irwindale to Monrovia, relocation of parking structures at the  
27 Monrovia and Irwindale light-rail stations, and replacement of two bridges.

28

1           24.     Petitioners are informed and believe, and based thereon allege, that Metro is  
2 not the recipient of an approval that is the subject of the action or proceeding as described  
3 in this matter; however, Petitioners are informed and believe, and based thereon allege,  
4 that upon completion of the Phase 2A Project by Respondent, the Phase 2A Project may  
5 be turned over by Respondent to Metro, and as a result, Metro could possibly be  
6 considered a real party in interest, and for that reason and in an abundance of caution,  
7 Petitioners have named Metro as such.

8           25.     Prior to Respondent's approval and/or certification of the SEIR for the  
9 Phase 2A Project, on or about December 27, 2010, the FTA issued a Notice of Intent to  
10 prepare an EIS for the Phase 2B Project, the Azusa to Montclair portion of the Gold Line  
11 Phase II, Pasadena to Montclair – Foothill Extension. The Notice of Intent indicates that  
12 Respondent will be preparing a joint EIR/EIS with FTA in order to comply with both  
13 CEQA and NEPA.

14           26.     Petitioners are informed and believe, and based thereon allege, that prior to  
15 the filing of this Petition for Writ of Mandate, Respondent issued a Notice of Preparation  
16 for either an EIR or a Supplemental EIR and began scoping meetings in anticipation of  
17 preparation of the environmental documentation for the Phase 2B Project.

18           27.     Petitioners made extensive oral and written comments in opposition to the  
19 Phase 2A Project and SEIR. Petitioners have exhausted all administrative remedies.

20           28.     Petitioners have performed all conditions imposed by law precedent to filing  
21 this action, including complying with the requirement of Public Resources Code Section  
22 21167.5 by sending notice to Respondent that this action would be filed.

23           29.     Petitioners will also serve a copy of this Petition on the California Attorney  
24 General as required by law.

25           30.     Petitioners have no plain, speedy or adequate remedy available to it in the  
26 ordinary course of law to redress the claims alleged in this petition. Petitioners and the  
27 public generally will suffer irreparable harm if Respondent is not required to comply with  
28

1 CEQA and to vacate and set aside the above-described approvals and SEIR related to the  
2 Phase 2A Project.

3 **FIRST CAUSE OF ACTION**  
4 **(Violation of CEQA And CEQA Guidelines –**  
5 **Project Description and Segmentation)**

6 31. Petitioners reallege and incorporate herein by reference the allegations of  
7 Paragraphs 1 through 30, inclusive, of this petition.

8 32. Respondent's action in certifying the SEIR for the Phase 2A Project  
9 constitutes a prejudicial abuse of discretion in that Respondent failed to proceed in the  
10 manner required by law and failed to support its decision by substantial evidence,  
11 including but not limited to as follows:

12 a. Respondent has improperly piecemealed the Phase 2A Project from  
13 the Phase 2B Project and the overall Gold Line Phase II, Pasadena to Montclair – Foothill  
14 Extension.

15 b. Petitioners are informed and believe, and based thereon allege, that  
16 the Phase 2A Project and Phase 2B project, both segments of the Gold Line Phase II,  
17 Pasadena to Montclair – Foothill Extension, are interrelated actions because they are  
18 related as to time, infrastructure and the entity undertaking the action.

19 c. Petitioners are informed and believe, and based thereon allege, that  
20 the Phase 2A Project benefits from and is directly tied to and interrelated with the Phase  
21 2B Project, and vice versa.

22 d. Petitioners are informed and believe, and based thereon allege, that  
23 the Phase 2A Project and the Phase 2B Project are part of a single coordinated endeavor,  
24 the Gold Line Phase II, Pasadena to Montclair – Foothill Extension.

25 e. Respondent relied on an improper project description because the  
26 Phase 2A Project is piecemealed from the Phase 2B Project and the overall Gold Line  
27 Phase II, Pasadena to Montclair – Foothill Extension. The project description in the Phase  
28

1 2A Project SEIR is erroneous and misleading, and Respondent's approval of the Phase 2A  
2 Project SEIR with this defect was a further abuse of discretion.

3 f. Petitioners are informed and believe, and based thereon allege, that  
4 the Phase 2A Project will likely change the scope and nature of the Phase 2B Project, or  
5 vice versa. Respondent's separate evaluation of these impacts frustrates the purpose of  
6 CEQA, i.e., informed public participation and informed decisionmaking.

7 g. Petitioners are informed and believe, and based thereon allege, that  
8 because Respondent has piecemealed the Phase 2A Project from the Phase 2B Project and  
9 the overall Gold Line Phase II, Pasadena to Montclair – Foothill Extension, Respondent  
10 has avoided, *inter alia*, complete study of environmental impacts, a reasonable range of  
11 alternatives, and proper consideration of mitigation measures.

12 33. As a result of Respondent's violations of CEQA, Petitioners have been  
13 harmed in that Petitioners and other members of the public were not fully informed about  
14 the significant environmental impacts of the Phase 2A Project and the overall Gold Line  
15 Phase II, Pasadena to Montclair – Foothill Extension prior to approval and/or certification  
16 of the Phase 2A Project SEIR.

17 34. Petitioners as well as members of the general public will suffer irreparable  
18 harm if the relief requested herein is not granted and the Phase 2A Project design/build  
19 contracts are awarded and/or construction is commenced in the absence of a full and  
20 adequate SEIR, and absent compliance with all other applicable provisions of CEQA.

21 **SECOND CAUSE OF ACTION**

22 **(Violation of CEQA And CEQA Guidelines –**  
23 **Improper/Inaccurate Alternatives Analysis)**

24 35. Petitioners reallege and incorporate herein by reference the allegations of  
25 Paragraphs 1 through 34, inclusive, of this petition.

26 36. Respondent's action in certifying the SEIR for the Phase 2A Project  
27 constitutes a prejudicial abuse of discretion in that Respondent failed to proceed in the  
28

1 manner required by law and failed to support its decision by substantial evidence,  
2 including but not limited to as follows:

3           a.     The Phase 2A Project SEIR fails to consider a reasonable range of  
4 off-site alternatives, including alternatives identified as feasible in other public records in  
5 possession of Respondent, and fails to adopt an alternative that could have avoided or  
6 substantially lessened the Phase 2A Project's significant environmental impacts, including  
7 those related to the proposed taking and destruction of numerous private properties and  
8 businesses.

9           b.     The Phase 2A Project SEIR fails properly to analyze impacts of the  
10 one off-site alternative it does ostensibly consider, including but not limited to impacts to  
11 land use/planning, traffic, noise, hazardous materials, and hydrology.

12           c.     The Phase 2A Project SEIR fails to consider a reasonable range of  
13 on-site alternative configurations, and fails to adopt an alternative that could have avoided  
14 or substantially lessened the Phase 2A Project's significant environmental impacts,  
15 including those related to the proposed taking and destruction of numerous private  
16 properties and businesses.

17           37.    As a result of Respondent's violations of CEQA, Petitioners have been  
18 harmed in that Petitioners and other members of the public were not fully informed about  
19 potential alternatives to the Phase 2A Project that could have substantially lessened or  
20 eliminated significant environmental impacts of the Phase 2A Project, prior to approval  
21 and/or certification of the Phase 2A Project SEIR.

22           38.    Petitioners as well as members of the general public will suffer irreparable  
23 harm if the relief requested herein is not granted and the Phase 2A Project design/build  
24 contracts are awarded and/or construction is commenced in the absence of a full and  
25 adequate SEIR, and absent compliance with all other applicable provisions of CEQA.  
26  
27  
28

**THIRD CAUSE OF ACTION**

**(Violation of CEQA And CEQA Guidelines –  
Improper/Inaccurate Project Analysis)**

39. Petitioners reallege and incorporate herein by reference the allegations of Paragraphs 1 through 38, inclusive, of this petition.

40. Respondent's action in certifying the SEIR for the Phase 2A Project constitutes a prejudicial abuse of discretion in that Respondent failed to proceed in the manner required by law and failed to support its decision by substantial evidence, including but not limited to as follows:

a. The Phase 2A Project SEIR fails to evaluate properly, and with a good faith effort at full disclosure, the Project's significant impacts on, *inter alia*, air quality, traffic, noise, hazardous materials, land use/planning, recreation and hydrology.

b. The Phase 2A Project SEIR is inconsistent with the 2007 FEIR it purports to supplement.

41. CEQA requires every lead agency to provide a good faith, reasoned analysis in response to comments received on an EIR, to address recommendations and objections in detail, and to explain why specific comments and suggestions, especially those of experts, were not accepted. The Phase 2A Project SEIR fails to respond adequately, or in many cases at all, to comments on the SEIR, including comments from Petitioners' experts, and including but not limited to comments regarding air quality, traffic, noise, hazardous materials, land use/planning, recreation, hydrology, feasibility, and reduced environmental impacts of alternatives.

42. As a result of Respondent's violations of CEQA, Petitioners have been harmed in that Petitioners and other members of the public were not fully informed about the significant environmental impacts of the Phase 2A Project prior to approval and/or certification of the Phase 2A Project SEIR.

43. Petitioners as well as members of the general public will suffer irreparable harm if the relief requested herein is not granted and the Phase 2A Project design/build

1 contracts are awarded and/or construction is commenced in the absence of a full and  
2 adequate SEIR, and absent compliance with all other applicable provisions of CEQA.

3 **FOURTH CAUSE OF ACTION**

4 **(Violation of CEQA And CEQA Guidelines – *Post Hoc* Decisionmaking)**

5 44. Petitioners reallege and incorporate herein by reference the allegations of  
6 Paragraphs 1 through 43, inclusive, of this petition.

7 45. Respondent's action in certifying the SEIR for the Phase 2A Project  
8 constitutes a prejudicial abuse of discretion in that Respondent failed to proceed in the  
9 manner required by law and failed to support its decision by substantial evidence,  
10 including because the Phase 2A Project SEIR and its approval constitute an improper *post*  
11 *hoc* rationalization for a decision to locate the M&O Facility in Monrovia, which decision  
12 was effectively made prior to approval and/or certification of the Phase 2A Project SEIR.

13 46. As a result of Respondent's violations of CEQA, Petitioners as well as  
14 members of the general public will suffer irreparable harm if the relief requested herein is  
15 not granted and the Phase 2A Project design/build contracts are awarded and/or  
16 construction is commenced in the absence of a full and adequate SEIR, and absent  
17 compliance with all other applicable provisions of CEQA.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, Petitioners pray for entry of judgment as follows:

20 1. That this Court issue a writ of mandate directing Respondent to vacate and  
21 set aside its Phase 2A Project approvals, and to vacate and set aside its approval and/or  
22 certification of the SEIR for the Project.

23 2. That this Court issue a writ of mandate suspending the authority of  
24 Respondent, its governing board, officers, employees, agents, committees and other  
25 subdivisions, to grant any contracts, authority, permits or entitlements as part of the Phase  
26 2A Project until a valid and adequate Phase 2A Project SEIR is prepared, circulated, and  
27 certified as complete consistent with CEQA, the CEQA Guidelines, and all other  
28 applicable laws.



1           3.     That this Court issue a temporary restraining order and a permanent  
2 injunction enjoining Respondent, its governing board, officers, employees, agents,  
3 committees and other subdivisions, and contractors and subcontractors, from undertaking  
4 any activities or construction pursuant to Respondent's approval and/or certifications of  
5 the Phase 2A Project SEIR as described herein, and further enjoining Respondent, its  
6 governing board, officers, employees, agents, committees and other subdivisions, and  
7 contractors and subcontractors, from taking any actions to change the environment,  
8 including demolitions, site clearance, other site preparation, or in any other way to take or  
9 acquire property in furtherance of the Project, prior to Respondent's full compliance with  
10 CEQA.

11           4.     That this Court award Petitioners their attorney fees, including under Code  
12 of Civil Procedure Section 1021.5.

13           5.     That this Court award Petitioners their costs of suit herein.

14           6.     That this Court award such other and further relief as it deems just and  
15 proper.

16  
17  
18 DATED: February 18, 2011

THE SILVERSTEIN LAW FIRM, APC

19  
20 By:

  
ROBERT P. SILVERSTEIN  
BRADLY S. TORGAN  
Attorneys for Petitioners EXCALIBUR  
PROPERTY HOLDINGS, LLC and GEORGE  
BROKATE

## EXHIBIT 2

**Glyer, Reed**

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**From:** Do, Alisa [Alisa.Do@mail.house.gov]  
**Sent:** Thursday, June 16, 2011 5:28 PM  
**To:** Scott Ochoa  
**Cc:** M Lutz  
**Subject:** Re: one more thing  
**Follow Up Flag:** Follow up  
**Flag Status:** Red

Thanks for keeping me informed of all the issues.

---

**From:** Scott Ochoa [mailto:sochoa@ci.monrovia.ca.us]  
**Sent:** Thursday, June 16, 2011 07:21 PM  
**To:** Do, Alisa  
**Cc:** M Lutz <maryann@lutz-co.com>  
**Subject:** one more thing

Alisa,

In reflection upon your suggestion that everyone lower their guns for the sake of the project, I need to tell you that there is one more loose end to this story.

Basically, the Army Corps of Engineers is doing an environmental assessment – prepared by GLCA – for the various bridges under their jurisdiction along the alignment (i.e., San Gabriel River Bridge, LA County Flood Control District bridges). Such an assessment was not covered as part of the January SEIR and needs a NEPA review. In reviewing the document, our staff identified a few omissions and shortcomings.

Considering that we were supportive of the SEIR and now find ourselves being threatened with condemnation vis-a-vis that same document, Monrovia cannot afford not to use the NEPA action as a means to defend against a potential GLCA condemnation action on July 5<sup>th</sup>. Thus, we have submitted concerns and objections regarding the NEPA.

At the settlement meeting on Tuesday, Mayor Lutz and I advised Fasana, Larramendi, Balian and Purcell that we intended to file the objection letter by Friday's (tomorrow) deadline. Given the positive direction of the meeting, we suggested several times that GLCA extend the comment period so that we would not have to file the letter. While John Fasana understood our position, Habib was rather dismissive. His response was that we should submit the letter with our concerns, and they would address it in due course.

Thus, we have submitted the letter.

If we need to draw out the project as a means of protecting our interests, we believe this step helps accomplish that goal. Obviously, we hope that that is not necessary.

Either way, I wanted you to be aware. We don't want to be viewed as obstructionists, but this is one of the few options available to us to fend off a condemnation action.

Please, if you have any questions about this, feel free to contact me directly.

so

Scott Ochoa  
City Manager  
City of Monrovia  
(626) 932-5550

7/6/2011